UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.537
3 July 1997

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
Geneva, 12 May-18 July 1997

DIPLOMATIC PROTECTION

Report of the Working Group

1. Pursuant to paragraph 13 of General Assembly resolution 51/160, the International Law Commission at its 2477th meeting on 15 May established a Working Group 1/ to examine further the topic of "Diplomatic Protection" and "to indicate the scope and the content of the [topic] in the light of the comments and observations made during the debate in the Sixth Committee on the report of the Commission and any written comments that Governments may wish to submit".

2. The Working Group held three meetings from 16 May to 1 July. It had before it the "General Outline" prepared by the Commission at its forty-eighth session, 2/ the topical summary of the discussion held in the Sixth Committee at its fifty-first session, 3/ and written comments submitted by Governments. 4/

1/ Mr. M. Bennouna (Chairman), Mr. I. Brownlie, Mr. J. Crawford, Mr. R. Goco, Mr. G. Hafner, Mr. M. Herdocia Sacasa, Mr. J. Kateka, Mr. Lukashuk, Mr. T. Melescanu, Mr. G. Pambou-Tchivounda, Mr. B. Sepulveda, Mr. R. Rosenstock, Mr. B. Simma and Mr. Z. Galicki (ex-officio).

2/ See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10, (A/51/10), Addendum 1, p. 335.

3/ A/CN.4/479, section E (6).

4/ A/51/358 and Add.1.

3. The Working Group is mindful of the customary origins of diplomatic protection whose exercise was characterized by the Permanent Court of International Justice as an "elementary principle of international law" (The Mavrommatis Palestine Concessions). Given the increased exchange of persons and commerce across State lines, claims by States on behalf of their nationals will remain an area of significant interest. The Working Group concluded that the subject of Diplomatic Protection is appropriate for consideration by the Commission.

4. The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group has not taken a position on various issues raised which require careful study of State practice, jurisprudence and doctrine.

5. The Working Group agreed that the study could follow the traditional pattern of articles and commentaries, but left for future decision the question of its final form. The outcome of the work of the Commission on the subject may, for example, take the form of a convention or guidelines.

6. In the view of the Working Group, the topic is primarily concerned with the basis, conditions, modalities and consequences of diplomatic protection: claims brought by States on behalf of their nationals against another State. A similar mechanism has been extended by analogy to claims by international organizations for the protection of their agents.

7. The Working Group reviewed the "General Outline" of the topic of diplomatic protection contained in the report of the Commission on the work of its forty-eighth session and decided to retain only material dealing with diplomatic protection stricto sensu. The scope of the topic will not include deriving from direct injury caused by one State to another. In other words it would only address indirect harm (harm caused to natural or legal persons whose case is taken up by a State) and not direct harm (harm caused directly to the State or its property). It concluded therefore that section 3 of the outline (Protection of certain forms of State property, and individuals only incidentally) was not strictly part of the topic.

8. The Working Group also drew attention to the distinction between diplomatic protection properly so called, that is to say a formal claim made by a State in respect of an injury to one of its nationals which has not been redressed through local remedies, and certain diplomatic and consular activities for the assistance and protection of nationals as envisaged by articles 3 and 5 respectively of the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963.

9. The Working Group agreed that the title "Diplomatic Protection" should remain, for it has become a "term of art" in all official languages of the United Nations.

10. The delimitation of the scope of the topic prompted the Working Group to recall a number of principles and distinctions which help to define the

institution of diplomatic protection. Adhering strictly to the content of the topic, the Working Group presents its main aspects as they emerge in international practice.

I. SCOPE OF THE TOPIC

1. Topic confined to secondary rules of international law

11. Just like the topic of State responsibility, the Commission in its study of diplomatic protection should focus on the consequences of an internationally wrongful act (by commission or omission) which has caused an indirect injury to the State usually because of injury to its nationals.

12. Thus the topic will be limited only to codification of secondary rules on the subject: while addressing the requirement of a violation of an international obligation of the State as a prerequisite, it will not address the specific content of those international legal obligations, whether under customary or treaty law.

2. The nature and definition of diplomatic protection

13. On the basis of nationality of natural or legal persons, States claim, as against other States, the right to espouse their cause and act for their benefit when they have suffered injury and/or a denial of justice in another State. In this respect, diplomatic protection has been defined by the international jurisprudence as a right of the State (see, for example, the Mavrommatis Palestine Concessions case, Series A, No. 2, 30 August 1924, and the Panevezys-Saldutiskis Railway case, Series A/B, No. 76, 28 February 1939).

14. From an historical standpoint, it is the link of nationality which provides the basis of a right of protection by the State, although in some cases, by means of an international agreement, a State may be invested with the right to represent another State and act for the benefit of its nationals.

15. The Hague Convention of 1930 stated as a rule that "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". The question may arise as to whether this rule is still applicable and whether the criterion of effective nationality should not also be applied in this case. (Iran-United States case, Series A, No. 18, 6 April 1984). The situation may change in case of protection claimed by international organizations. In the Reparations case, the International Court of Justice stated that the protection claimed by the United Nations is based not upon the nationality of the victim but upon his status as an agent of the organization (I.C.J., Advisory Opinion of 11 July 1949, "Reparations for injuries suffered in the service of the United Nations", 1949, I.C.J. Reports). Therefore it does not matter whether or not the State to which the claim is addressed regards the victim as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

16. A number of issues require further discussion. One is whether diplomatic protection is based solely on a jurisdiction ratione personae over

the beneficiary. A related question is whether, even when an individual declines diplomatic protection from its State of nationality, that State may nevertheless exercise diplomatic protection. Another issue is whether diplomatic protection may be exercised at the discretion of a State, or whether there is a right of a national to diplomatic protection. Yet another issue is whether the topic should cover forms of protection other than claims. Finally, the issue of the application of the rules of diplomatic protection in instances of State succession may be considered.

3. Diplomatic protection concerns indirect injury

17. An injury suffered by a national which is espoused by a State is termed indirect. Such an espousal makes it possible to circumvent the lack of direct access of the nationals to the international sphere. The State then intervenes "to ensure, in the person of its subjects, respect for the rules of international law" (Mavrommatis). When the injury is suffered by an agent of an international organization, the organization may exercise functional protection on his behalf (to protect his rights), without prejudice to the possibility of the national State acting for his benefit by virtue of diplomatic protection (Reparations case).

18. The question also arises as to the type of injury for which an international organization is allowed to exercise protection. In the Reparations case, the International Court of Justice limited the injury for which the organization could demand reparation to one arising from a breach of an obligation designed to help an agent of the organization perform his or her duties (ibid, p. 182). The Working Group, at this stage, takes no position on whether the topic of "diplomatic protection" should include protection claimed by international organizations for the benefit of their agents. Taking into account the relationship between the protection exercised by States and functional protection exercised by international organizations, the Working Group agreed that the latter should be studied, at the initial stage of the work on the topic, in order to enable the Commission to make a decision, one way or another, on its inclusion in the topic.

19. The espousal of the claim by the national State gives it some freedom in the determination with the other State on the form of settlement for reparation, which may also include a lump sum for a group of persons.

II. CONTENT OF THE TOPIC

20. The topic of diplomatic protection deals with at least four major areas: (i) the basis for diplomatic protection, the required linkage between the beneficiary and the States exercising diplomatic protection; (ii) claimants and respondents in diplomatic protection, that is who can claim diplomatic protection against whom; (iii) the conditions under which diplomatic protection may be exercised; and (iv) finally, the consequences of diplomatic protection. The Working Group has identified a number of issues under each of the four main areas for study by the Commission.

Chapter one. Basis for diplomatic protection

A. Natural persons

1. Nationals, continuous nationality

2. Multiple nationals: dominant nationality, genuine link, effective nationality, bona fide nationality

(a) As against third States

(b) As against one of the States of nationality

3. Aliens in the service of the State

4. Stateless persons

5. Non-nationals forming a minority in a group of national claimants

6. Non-nationals with long residence in the State espousing diplomatic protection

7. Non-nationals in the framework of international organizations of integration

B. Legal persons

1. Categories of legal persons

(a) Corporations, and other associations in varying forms in different legal systems

(b) Partnerships

2. Insurers

3. Right of espousal in special cases (factors: nationality of legal persons, theories of control or nationality of share holders)

C. Other cases (ships, aircrafts, spacecrafts, etc.)

D. Transferability of claims

Chapter two. Parties to diplomatic protection (claimants and respondents in diplomatic protection)

A. States

B. International organizations ("functional" protection)

C. Regional economic integration organizations

D. Other entities

Chapter three. The conditions under which diplomatic protection is exercised

A. Preliminary considerations

1. Presumptive evidence of violation of an international obligation by a State

2. The "clean hands" rule

3. Proof of nationality

4. Exhaustions of local remedies

   (a) Scope and meaning

   (b) Judicial, administrative and discretionary remedies

   (c) Exception to the requirement of exhaustion of local remedies

      (i) Demonstrable futility in utilizing local remedies

      (ii) Absence of safety for the claimant in the site where local remedies may be exercised

      (iii) Espousal of large numbers of similar claims

5. Lis alibi pendens

6. The impact of the availability of alternative international remedies

   (a) Right of recourse to human rights bodies

   (b) Right of recourse to international tribunals in the field of foreign investment

   (c) Other procedural obligations

7. The question of timeliness; effect of delay in the absence of rules on prescription

B. Presentation of an international claim

1. The relevance of damage as an incidence of the claim

2. The rule of nationality of claims

C. The circumstances under which a State is deemed to have espoused a claim for diplomatic protection

D. Renunciation of diplomatic protection by an individual

Chapter four. Consequences of diplomatic protection

A. Accord and satisfaction

B. Creation of a jurisdiction to determine and liquidate claims

C. Lump-sum settlements

D. Elimination or suspension of private rights

E. Effect on settlements of subsequent discovery of mistake, fraud, etc.

III. FUTURE WORK OF THE COMMISSION

21. The Working Group recommends the appointment of a Special Rapporteur for the topic at the present session. The Special Rapporteur will present a preliminary report at the next session of the Commission on the basis of the outline proposed by the Working Group. The Working Group also suggests that the Commission attempt to complete the first reading of the topic by the end of the present quinquennium.